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Generally speaking, private property can only be taken, or appropriated for public use through the exercise of the right of eminent domain. The state, however, is not limited to this mode of appropriation for it is endowed with that broad regulatory power, the police power, subject to which all private property is held. Consistent with the brevity of this discussion—it is the purpose of the writer to set forth the nature, application, effect, and general distinguishing features of these powers.

The power of eminent domain is defined as "a right in the government, acting in the interest of the whole public to force the owner of the property to sell the same to the public, from whom his title originally came, and subject to whose needs it is always held."[1] This is an inherent power of the sovereignty. It is not created by the Constitution but is merely recognized as a necessary power of the state, the preservation of which is essential to the growth and welfare of the community. Being an attribute of the sovereignty the sovereign may grant it to whomsoever it may think proper and deny it to all others. This is purely a matter of legislative discretion, unless it is limited by the Constitution.[2]

As to what property is subject to appropriation by the state by the exercise of this right of eminent domain we find that the word "property" as used in the Constitution is one of the most general import. It extends to every species of right capable of being enjoyed as such upon which it is practicable to place a money value. It includes all estates successive in time and all easements, and similar rights in land, provided they are rights which are capable of enforcement by the courts as against the owners of the other interest in the land. It also includes personal property and incorporeal hereditaments, franchises, and other contracts with the state or its subdivisions.[3]

1 Black's Constitutional Law, page 469.
2 Consumers' Gas Trust Co. v. Harless, 131 Ind. 446.
3 Hagerstown v. Groh, 101 Md. 560. 10 R. C. L., pg. 74.

We have seen that the taking must be for a public use. "Taking" under the power of eminent domain may be defined as "entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of *all* beneficial enjoyment thereof."[4]

As to the meaning of "public use" the authorities are in conflict. Many would confine it to some actual use or enjoyment by the public of the property taken,[5] while the broader view extends it to whatever is of benefit to any considerable portion of the public, as regards health, material prosperity, or other welfare.[6] But whatever distinction may be taken as the degree of utility necessary, it would seem that the benefit must accrue to the community as a whole, not merely to a particular individual or class. Although the necessity or expediency of the exercise of the power lies wholly in the discretion of the legislature, the question whether the use is public is ultimately one for the courts, that is, the declaration by the legislature of a use to be public will be given great weight unless it is clearly arbitrary or in excess of the power.[7]

The government in the exercise of the right of eminent domain takes, not the proportionate share which every individual is bound to contribute in way of taxes for the security which is afforded by the government, but something over and above his share, and is therefore bound to return to him not only the general compensation which it gives to all persons who pay taxes, but particular compensation for the property seized.[8] This right to compensation has been recognized by the courts as a fundamental right founded on natural justice.[9] The Constitution of the United States in the Fifth Amendment provides; "nor shall private property be taken for public use without just compensation." However it is well-established that this provision is exclusively a restriction upon the powers of the federal government and

4 Fruth v. Board of Affairs of City of Charleston, 75 W. Va. 456.
5 Board of Health of Portage Tp. v. Van Hoesen, 87 Mich. 533.
6 Talbot v. Hudson, 16 Gray (Mass.) 417.
7 Walker v. Shasta Power Co., 160 Fed. 856.
8 Pomeroy's Constitutional Law (3rd Ed.), page 161.
9 People ex rel. N. Y. C. & H. R. R. Co. v. Priest, 206 N. Y. 274.

not a restraint on the states.[10] But most states have now adopted similar provisions.[11] It is also settled that a taking of property for a private use or without just compensation is a deprivation of property without due process of law. Accordingly since the adoption of the Fourteenth Amendment there is a possibility of a federal question arising in every taking by eminent domain under state authority even if all the requirements of the Constitution of the state are held to have been complied with.[12]

Considering now the effect of police power on the rights of property it is generally conceded that all property is held subject to the general police power of the state so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order and morals of the community.[13] This principle emanates from the maxim *sic utere tuo ut alienum non laedas* and to effect its purpose the legislature under the police power may pass laws regulating the acquisition enjoyment, and disposition of property,[14] even though in some respects these may operate as a restraint on individual freedom or the use of private property.[15] Accordingly it has been held that statutes and ordinances requiring the removal or destruction of property or the isolation of infected persons when necessary for the protection of the public health do not violate the Constitutional guarantee of the right of enjoyment of liberty and property because neither the right to liberty nor the right to property extends to the use of liberty or property to the injury of others.[16]

Police regulations are not a taking under the right of eminent domain or a deprivation of property without due process of law and so are not unconstitutional although they may interfere with private rights without providing for compensation. The constitutional guarantee of the Fourteenth Amendment limiting the taking of private property without compensation is not a limitation of the exercise of

10 Barron v. Baltimore 7 Peters' R. 243.
11 So. I. & M. Bridge Co. v. Stone, 73 S. W. 453. Lewis, Eminent Domain (3rd Ed), 15-61.
12 Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112 C. B. & Q. R. Co. v. Chicago, 166 U. S. 266.
13 People v. Smith, 108 Mich. 527.
14 Cincinnati I. & W. R. Co. v. Connersville, 170 Ind. 316.
15 Booth v. People, 186 Ill. 43.
16 Kirk v. Wyman, 83 So. Carolina 372.

necessary police powers.[17] Whenever the use and enjoyment of property by the owner is regulated by the police power or if he is deprived of his property altogether, it is not taken for public use but rather destroyed in order to conserve the safety, morals, health, or general welfare of the public, and in neither case is the owner entitled to compensation for the law either regards his loss as *damnum absque injuria,* or considers him sufficiently compensated by sharing in the general benefits resulting from the exercise of this power.[18] Such regulations must however be reasonable, and the legislature cannot under the guise of police regulations arbitrarily invade private property or personal rights, the test being found in the answer to the question whether the regulations made have some real and substantial relation to the public safety, health or welfare, and whether that is the end sought. If not, the alleged police regulation is unreasonable and may be held void. It is for the legislature to determine what regulations are proper but it is for the courts to determine whether the exercise is reasonable and if it tends to promote the object of the police power.[19]

In comparing the power of eminent domain with that of police power we note that they resemble each other in that each power recognizes the superior right of the community against the selfishness of the individual, the former depriving him of the right to obstruct the public necessity and convenience by obstinately refusing to part with his property when needed for public use, the latter preventing his use of his own property in his own way as against the general comfort and protection of the public.[20] The distinction however lies in the fact that in eminent domain the public welfare is promoted by the actual taking of the property or some right therein from the owner and transferring it to a public agency to be enjoyed by it as its own, whereas in police power the public is benefited merely by the regulation and restriction of the use of the property. In the exercise of the former right private property is taken for public use invariably entitling the owner to compensa-

17 Reiken v. Fuehring, 130 Ind. 382, 385.
18 Commonwealth v. Plymouth Coal Co., 232, Penn. 141.
19 People v. Winner, 271 Ill. 74.
20 The People v. The Town of Salem, 20 Mich. 452.

tion therefor, while police power is usually exerted merely to regulate the use and enjoyment of property of the owner, or if he is deprived outright it is not taken for public use but rather destroyed in order to promote the general welfare of the public and in neither case is the owner entitled to compensation.[21] The test is whether property is condemned to promote an affirmative public undertaking or, in other words, to confer an added benefit to the public; or whether to prevent harm to an established public interest, a deprivation of property is necessary either in the form of imposition of expense, or of the actual taking or destruction of property which participates in causing a public detriment.[22] As C. J. Agnew has said, "these distinctions clearly mark the cases distant from the border line between the two powers, but in or near to it they begin to fade into each other and it is difficult to say when compensation becomes a duty and when not."[23]

21 City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428.
22 Philadelphia v. Scott, 81 Penn. St. 80, 85.
23 See note 22.